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No. 89-1262

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 660,

Petitioner,

v.

EDWARD C. HESTER,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT, EDWARD C. HESTER IN OPPOSITION

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QUESTION PRESENTED

1. Did the Court of Appeals err in its choice of law by choosing federal law to determine at which point a limitations period begins to run on a federal cause of action where the limitations period is borrowed from a state statute of limitations?

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This case does not justify the attention of the Supreme Court on certiorari. The petition inexplicably misstates the question presented by couching its two "questions presented" in terms of "tolling;" that is, suspending a limitations

period which already has begun to run. The question decided by the court below, however, was simply **when the statute began to run** in the first place. The law on that point, in this Court and in all the circuits which have considered the question, is quite clear: determination of when a statute of limitations begins to run on a federal cause of action is a question determined by federal and not state law, even if the particular statute in question was borrowed from state law. Cases dealing with borrowing state **tolling** rules are irrelevant. There is no conflict between the decision below and any decision of this Court or of any circuit. Finally, no special or important reasons exist that merit review. This case has been pending since 1984. Not a single day of trial has been held, yet two

petitions for certiorari already have been filed. As noted above, this one is completely frivolous, miscasting a question of when the statute of limitations began running as a question of tolling or suspending running after it has commenced. In a district court, such conduct would call for Rule 11 sanctions. This case fails to meet any of the applicable criteria for granting certiorari stated in Rule 17 of the rules of this Honorable Court.

STATEMENT OF THE CASE

Respondent Hester is a veteran entitled to veterans' preference in employment under the union contract of TVA to which Petitioner consented and is a party. On November 8, 1983, Petition fined him $3,000 for allegedly working for TVA without its consent. He commenced this action on November 7, 1984 (Pet.

App. 64a), based in part on 28 U.S.C. § 411(a)(5) which provides as here pertinent that:

> No member of any labor organization may be fined ... unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

On remand from this Court, a majority of the court of appeals held that Hester's cause of action accrued and the statute of limitations began to run when the International Union, a defendant below, affirmed a reduced fine of $500.00 on August 6, 1984 (Pet. App. 3a, 28a). It therefore was not barred by the applicable one-year statute of limitations set forth in Ala. Code § 6-2-39(a)(5) (Pet. App. 3a). The suit was timely brought if the statute began to run on the date of the fine or upon its affirmance. It

was untimely if it began to run on the date Respondent served the disciplinary charge on Hester (October 7, 1983) (Pet. App. 4a).[1]

---

[1] The gravamen of Hester's LMRDA claim was the fine; the dissenting judge below was apparently of the opinion that service of the charge itself "otherwise disciplined" Hester, a notion contrary to all authorities on that point, Cox v. Hutcheson, 204 F. Supp. 442 (S.D. Ind. 1962); Rekant v. Schochtay-Gasos Union, 320 F.2d 271 (3d Cir. 1963); Bougie v. United Brotherhood of Carpenters, 67 LRRM 2402 (N.D. Ind. 1968); Deluhery v. Cooks and Stewards Union, 211 F. Supp. 529 (S.D. Ind. 1962); Dessler v. Teamsters Local 251, 686 F. Supp. 977, 978, 982 (D.R.I. 1988); Morrison v. National Maritime Union, 544 F.2d 19, 26 (2d Civ. 1976) ("At least in this context, the phrase 'otherwise disciplined' must be limited to types of punishment where compliance with these conditions [service of specific charges, time to prepare defense, fair hearing] is feasible."); Perales Vara v. Laborers' Local 89, 662 F. Supp. 492 (S.D. Calif. 1987); Etelson & Smith, Union Discipline under the Landrum-Griffin Act, 82 Harv. L.R. 727; Annotation, 43 ALR Fed. 9, 49-50. The question of the proper federal rule as to accrual of the cause of action and commencement of running of the statute is not, however, presented in this petition. The petition for certiorari frames

SUMMARY OF THE ARGUMENT

The only question argued by Petitioner is that state rather than federal law governs tolling of a state statute of limitations borrowed in reference to a federal cause of action. That question, however, is not presented on this record. The court of appeals decided that accrual of Respondent's federal claims and commencement of the limitations period was to be determined under federal law, and the decisions of this and all other courts uniformly support that proposition. There is no conflict of the decision below with any decision of this Court or of any other

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the question presented solely in terms of whether Federal or state law governs tolling or suspension of the statute of limitations, which is an issue that is not presented on the record.

circuit. The petition is trivial and should be denied.

ARGUMENT

Rawlings v. Ray, 312 U.S. 96 (1941) involved an action in a federal district court in Arkansas upon an assessment made against stockholder in an insolvent national bank, jurisdiction being based solely on federal questions. This Court held:

> The state statute of limitations is applicable. . . . The question is whether the statute began to run on the date of the assessment . . . or on the date fixed for payment . . . .
>
> The question as to the time when there was a complete and present cause of action . . . is a federal question and turns upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation.
>
> * * *
>
> Hence the statute of limitations did not begin to run until December 13,

> 1935, and the suit was in time.

Id. at 98 (emphasis added).

The Court has subsequently affirmed that principle. For example, in Cope v. Anderson, 331 U.S. 461, the Court stated as follows:

> But even though the period in which suit must be brought is governed by state limitations statutes, we have previously decided that the question of when the applicable state statute of limitations begins to run depends upon . . . federal law . . .

Id. at 464 (1947) (emphasis added).

The authorities in point are uniform in holding that the question when a federal cause of action accrues and starts the limitation running is a federal, not a state question. Keating v. Carey, 706 F.2d 377, 382 (2d Cir. 1983); Newman v. Prior, 518 F.2d 97, 100 (4th Cir.

1975); White v. Sanders, 650 F.2d 627, 630 (5th Cir. 1981); McCune v. City of Grand Rapids, 842 F.2d 903 (6th Cir. 1988); Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970), cert. denied 400 U.S. 852 (1970); Gibson v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986), cert. denied 479 U.S. 1054 (1987); Newcomb v. Ingle, 827 F.2d 675, 678 n.5 (10th Cir. 1987); Mitchell v. Hendricks, 431 F. Supp. 1295 (E.D. Pa. 1977); Sandidge v. Rogers, 167 F. Supp. 553 (S.D. Ind. 1958); Delta Theatres v. Paramount Pictures, 158 F. Supp. 644 (E.D. La. 1958); Winkler Koch Engineering Co. v. Universal Oil Products, 100 F. Supp. 15 (S.D.N.Y. 1951); Sisseton-Wahpeton Sioux Tribe v. United States, 686 F. Supp. 831 (D. Mont. 1988). The decision of the court of appeals is in accord with these decisions. The

court of appeals majority applied a federal rule as to when the state statute of limitation on Respondent's federal cause of actions began to run. The dissenting judge agreed that a federal rule applied, but disagreed as to what that federal rule of accrual was.

The question of tolling, on which Petitioner bases his petition, simply does not exist on this record. The tolling cases relied on by Petitioner are irrelevant. In them, the plaintiff had a complete cause of action, the statute had begun to run, and plaintiff claimed its running should be suspended for some reason. In Johnson v. Railway Express Agency, 421 U.S. 454 (1975), the statute of limitations was held not to be tolled because the plaintiff's EEOC charge was pending. That case held that state law applied

to tolling, not to accrual. The petition's sole argument is beside the point, ignoratio elenchi.

This is the second petition for certiorari in a case six years old which has never come to trial. The petition, based upon an issue not presented by the record, is trivial and dilatory. It falls far short of the standards of Fed. R. Civ. P. 11, and if award of an attorney's fee is ever justified in a certiorari petition, it is in this case. There is no Alabama authority cited either on accrual or tolling and the petition does not say what the state rule on either is, even if it could matter.

CONCLUSION

The petition should be denied and Respondent should be awarded attorney's fees.